90-1813

NO.

Supreme Court, U.S.
FILED
MAY 21 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

– OCTOBER TERM, 1990

CITY OF TOLEDO,
DIVISION OF INSPECTION,

Respondent,

versus

MERRILL DUTRIDGE, AND
LLOYD W. DUTRIDGE,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

APPENDIX

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PETITIONERS
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APPENDIX

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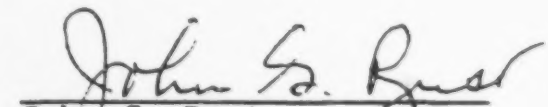
CERTIFICATE OF SERVICE

3 copies of the foregoing Appendix are served by First Class U.S. Mail to City of Toledo Law Director, Keith A. Wilkowski, One Government Center, Suite 2250, Toledo, Ohio 43624 this May 21, 1991.



John G. Rust
Counsel of Record
for Appellants Dutridge

THE SUPREME COURT OF OHIO

1991 TERM

To wit: February 20, 1991

City of Toledo, Division of Inspection, Appellee,

v.

Merrill Dutridge et al., Appellants.

Case No. 90-1309

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by John G. Rust.

(Court of Appeals Nos. L88255, L88256 and L88257)

Thomas J. Moyer (S)
Thomas J. Moyer
Chief Justice

THE SUPREME COURT OF OHIO

1991 TERM

City of Toledo, Division of Inspection, Appellee,	)	To wit: February 20, 1991
	)	Case No. 90-1373
v.	)	E N T R Y
Merrill Dutridge et al., Appellants.	)	

Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by JOhn G. Rust.

(Court of Appeals Nos. L88255, L88256 and L88257)

Thomas J. Moyer (S)
Thomas J. Moyer
Chief Justice

APP. P. 2

IN THE COURT OF APPEALS OF LUCAS COUNTY

City of Toledo, Division of Building Inspection,

Appellee

v.

Merrill and Lloyd Dutridge,

Appellants.

Court of Appeals No. L-88-257 (L-88-256) (L-88-255)

Trial Court No. CV 86-1554

DECISION AND JOURNAL ENTRY

Decided:

* * * * *

This is an appeal from three judgments of the Lucas County Court of Common Pleas. The first granted partial summary judgment to appellee, the second entered judgment pursuant to a jury verdict and the third denied appellants' motion for new trial.

Appellants, Merrill and Lloyd Dutridge, set forth the following assignments of error:

> "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GIVING DEFENDANT'S (sic) DUTRIDGE IN ACTION 84-1312, A HEARING, NOR ANY NOTICE THEREOF, BEFORE ISSUING AN ORDER ON AUGUST 30, 1984, FOR THE DESTRUCTION OF THE GARAGE: AND IN NOT NOTIFYING DEFENDANTS NOR THEIR COUNSEL, THAT THE COURT WAS CONSIDERING SUCH AN ORDER ALTHOUGH DEFENDANTS AND THEIR COUNSEL HAD ASKED FOR NOTICE AND HEARING, CONSIDERING SUCH AN ORDER: AND IN ORDERING SUCH DESTRUCTION, WITHOUT

ANY SHOWING OF NECESSITY, AND WITHOUT GIVING, NOR ORDERING ANY REAL NOR TIMELY NOTICE TO THE DUTRIDGE'S (sic) SO THAT THEY COULD REMOVE THEIR PROPERTY IN SAID GARAGE.

"II. THE TRIAL COURT PREJUDICIALLY ERRED IN GRANTING THE CITY SUMMARY JUDGMENT IN COURT 3 FOR THEIR COSTS OF DESTRUCTION OF THE GARAGE, AND FOR THE CLEAN UP ON OCTOBER 7, AND NOVEMBER,]983, BECAUSE SAID ORDERS WERE UNCONSTITUTIONAL, NO HEARINGS WERE HELD TO ESTABLISH NECESSITY NOR ACTIONABLE NON-COMPLIANCE BY THE DUTRIDGE'S (sic), AND THE DEFENDANTS HAD EVIDENCE OPPOSING THE CITY'S CLAIMS OF NUMBER OF MEN AND HOURS, ITEMS OF EQUIPMENT, AND OTHER ITEMS MAKING UP THE ENTIRE CLAIMED BILL.

"III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN CONSOLIDATING ACTION 84-1312 BY THE CITY, AND ACTION 87-0336 BY THE DUTRIDGE'S (sic) FOR ASSAULT AND BATTERY, AND DAMAGE AND DESTRUCTION TO THEIR PERSONAL PROPERTY IN OCTOBER AND NOVEMBER, 1983, BECAUSE EACH CONTAINED ISSUES LIKELY TO, AS THEY DID, INFLAME EMOTIONS, DISLIKES, PREJUDICES, AND ILL FEELINGS AGAINST THE DUTRIDGE'S (sic): WHICH IN TRUTH AND IN FACT WOULD INEVITABLY COME UP, AS THEY DID: AND DENIED THE DUTRIDGES' FAIR AND LAWFUL TRIALS.

"IV. THE TRIAL COURT PREJUDICIALLY ERRED IN ORDERING THE DESTRUCTION OF THE GARAGE ON OCTOBER 30, 1984, without GIVING THE DUTRIDGE'S (sic) A REASONABLE TIME TO REMOVE THEIR PERSONAL PROPERTY, AND IN NOT ALLOWING THE JURY TO CONSIDER THE CITY'S REFUSAL.

"V. THE TRIAL, COURT COMMITTED PREJUDICIAL ERROR BY DENYING THE

DUTRIDGES A FAIR AND LAWFUL TRIAL BY REASON OF EACH, AND ALL, OF THE RULINGS AND ACTIONS BY THE TRIAL COURT, INCLUDING, WITHOUT EXCLUDING OTHERS, THE FOLLOWING:

"A. IN GRANTING SUMMARY JUDGMENT DENYING THE DUTRIDGE'S (sic) THE RIGHT TO RECOVER FOR DAMAGES FROM THE CITY'S UNCONSTITUTIONAL AND KNOWING VIOLATIONS OF THE DUTRIDGE'S (sic) CONSTITUTIONAL RIGHTS;

"B. IN HOLDING THE DUTRIDGE'S (sic) UP AS PEOPLE WHO WERE TRYING TO RECOVER FOR SOMETHING WHICH THE DUTRIDGE'S (sic) WEREN'T ENTITLED TO;

"C. IN USING WORDS, WHICH DESPITE THE STATEMENTS OF DISCLAIMER, SO AS TO CREATE IN THE JUROR'S MINDS IMPRESSIONS THAT THE COURT FAVORED THE CITY, WHEN THOUGH THE COURT DID NOT SO INTEND;

"D. IN ALLOWING THE CITY TO BRING OUT MANY MATTERS GOING BACK A LONG TIME BEFORE AUGUST 30, 1984, AFTER THE DUTRIDGE'S (sic) WERE INSTRUCTED TO CONFINE THEMSELVES TO THAT DATE; AND THERE THE CITY, BY SHOWING THE DITRIDGE'S (sic) HAD RETAINED PERSONAL PROPERTY FOR A LONG TIME, WERE ABLE TO WORK A PREJUDICE AGAINST THE DUTRIDGE'S (sic);

"E. BY DENYING TO INSTRUCT THE JURY, ON THE VARIOUS POINTS MOVED AND REQUESTED BY THE DEFENDANT'S (sic)DUTRIDGE; AS REQUESTED, SPECIFICALLY, AND ALSO BY DEFENDANT'S (sic) REQUEST FOR INSTRUCTIONS TO JURY, EX. A.;

"F. BY VARIOUS ERRONEOUS RULINGS ON EVIDENCE.

"VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING THE DUTRIDGE'S (sic) MOTION FOR A NEW TRIAL."

The factual and procedural history of this case is as follows. On May 22, 1984, appellee, the City of Toledo, filed a complaint against appellants seeking injunctive relief and damages concerning the abatement of nuisance conditions existing at appellants' premises at 2943 Escott, Toledo, Ohio. (Case No. 84-1312.) The city sought abatement of the nuisance by demolition of a garage located on appellants' premises and requested the costs incurred in razing the garage as well as the costs incurred in a prior cleanup of the same premises.[1] In a Juhe 25, 1984 judgment entry, approved and signed by counsel or both parties, the court declared the garage a nuisance and ordered appellants to rehabilitate and repair it within thirty days. The court further ordered that if appellants failed to repair the garage within the time allotted, appellee was to raze the garage "forthwith" and appellants were to pay the costs of the demolition. On July 31, 1984, appellants filed a motion for an extension of time to repair the garage which was denied on

August 17, 1984. On August 29, 1984, appellants filed a motion for oral hearing regarding the court's June 25 and August 17 orders. The record reflects by a docket sheet entry dated August 30, 1984, the following:

> "Attorney Geoffrey Davis present on behalf of plaintiff. Attorney for defendant failed to appear. Court Reporter ordered. Plaintiff to effectuate entry of 6-22-84 (6-25-84)."

Thereafter, on August 30, 1984, appellants filed a complaint in the U.S. District Court (case No. 84-7724) seeking an injunction to prevent the demolition of their garage and alleging constitutional rights violations. When the U.S. District Court denied appellants' request for a temporary restraining order, appellee proceeded to raze appellants' garage pursuant to the order of the Lucas County Common Pleas Court. On January 17, 1986, the U.S. District Court adopted the magistrate's report and recommendation and dismissed appellants' complaint. In his report and recommendation, the magistrate found that appellee and the other defendants named in the complaint were

immune from prosecution and, therefore, entitled to dismissal of the claims against them. The magistrate also found that the defendants were entitled to dismissal on the basis that no due process violations occurred prior to the destruction of the garage. The magistrate noted that counsel for appellants had entered into a consent agreement which set a deadline for rehabilitation and provided for demolition if the deadline was not met.

On October 9, 1984, prior to the U.S. District Court's dismissal of case No. 84-7724, appellants filed a complaint in the Lucas County Common Pleas Court against appellee alleging, among other things, deprivation of their constitutional rights and that appellant Lloyd Dutridge was assaulted by city police officers during the October 7, 1983 yard cleanup by appellee.[2] (Case No. 84-2599.) On January 31, 1986, that case was dismissed without prejudice for appellants' failure to provide discovery. On January 30, 1987, case No. 84-2599 was refiled under case No. 87-0336

and subsequently consolidated with case No. 84-1312 at a pretrial conference held on April 16, 1987.

On January 7, 1986, a complaint was filed in Toledo Municipal Court by Attorney Donald Green, assignee of the city of Toledo, to recover from appellants the costs of the October 1983 yard cleanup and the August 30, 1984 demolition of the garage. (Case No. 86-00362.)

On March 13, 1986, appellants filed an answer and counterclaim alleging the same facts and claims as presented in their complaint filed on October 9, 1984. (Case No. 84-2599 subsequently refiled under case No. 87-0336.) This case was transferred to the Lucas County Court of Common Pleas and assigned case No. 86-1554 and on February 4, 1987, it was consolidated with case No. 84-1312.

On September 8, 1987, in case No. 84-1312, appellants filed their second amended answer and counterclaim alleging that (1) the city damaged various items of personal property worth $40,000 by a reckless and unreasonable demolition and

(2) the city's actions in razing the garage were unconstitutional. On October 7, 1987, appellee filed a motion for summary judgment and memorandum in support thereof and on May 18, 1988, the trial court filed its opinion and judgment entry granting partial summary judgment. The court found that (1) appellee was entitled to recover the costs incurred in the demolition of the garage and the yard cleanup and (2) appellants' constitutional claims were barred by the doctrines of res judicata and collateral estoppel. The claims remaining for trial included appellants' assertion that appellee recklessly destroyed appellants' personal property during the razing of the garage and appellants' allegation that appellant Lloyd Dutridge was assaulted by a Toledo police officer during the October 1983 yard cleanup.

The case proceeded to a jury trial on May 25, 1988, and on May 27, 1988, the jury rendered a verdict in favor of appellee. A motion for new trial was filed on June 30, 1988,

and overruled on July 13, 1988. On August 12, 1988, appellants filed a timely notice of appeal.

Since appellants first, fourth and part A. of appellants' fifth assignment of error relate to the same issue, specifically, whether appellants' constitutional rights were violated prior to the demolition of their garage, this court will consider them together.

In these assignments of error, appellants assert that they were denied notice and a hearing prior to the demolition of their garage and further that they were not given reasonable time to remove their personal property prior to the razing.

This court has thoroughly examined the entire record in this case and the law that applied to the issue raised in these assignments of error. Such review compels this court to conclude that the opinion and judgment entry prepared by Judge William J. Skow is in all respects a complete and proper recitation of the facts and law which apply to this case and that said judgment as it pertains to these assignments of error is correct. Accordingly,

e find appellants' first, fourth and part A. of appellants' fifth assignment of error not well-taken and accept and incorporate the opinion and reasoning of the trial court as our own and enter judgment accordingly. See opinion and judgment entry attached as Appendix A.

In their second assignment of error, appellants contend that the trial court erred in granting summary judgment as to Count 3 of appellee's complaint (case No. 84-1312) regarding the costs incurred for the October 1983 yard cleanup and the August 30, 1984 garage demolition.

Again, we find the decision of Judge Skow to be dispositive of the issue raised in this assignment of error. For this reason, that judgment affirmed and adopted as our own with regard to the trial court's finding as to Count 3 of appellee's complaint. Accordingly, appellants' second assignment of error is found not well-taken. See opinion and judgment entry attached as Appendix A.

In their third assignment of error, appellants

contend that the trial court erred in consolidating case No. 87-0336 with case No. 84-1312. Appellants assert that the nuisance claims set forth by appellee in case No. 84-1312 were prejudicial to their assault and battery claim set forth in case No. 87-0336.

Civ. R. 42(A) provides as follows:

> "(A) Consolidation. When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

See, also, Supp. R. 7.07.

The record reveals that on February 20, 1987, appellee filed a motion to consolidate case No. 87-0336 with case No. 84-1312 pursuant to Supp. R. 7.07. In its motion, appellee maintained that case No. 87-0336 raises the same facts and claims as alleged in a counterclaim raised by appellants in case No. 86-1554 and consolidated with case No. 84-1312. At a pretrial conference held on April 16, 1987, the

court granted appellee's motion and consolidated case No. 87-0336 with case No. 84-1312.

Upon consideration of the particular facts and circumstances of this case as set forth above, we find that the trial court did not abuse its discretion in consolidating case No. 87-0336 with case No. 84-1312. See Fair v. School Employees Retirement System (1975), 44 Ohio App. 2d 115. A review of the record herein reveals that the actions herein involve common questions of law and fact. Accordingly, appellants' third assignment of error is found not well-taken.

Appellants' fifth assignment of error is divided into six parts. Essentially, appellants argue that they were denied a fair trial because (1) statements made by the trial court were prejudicial to appellants, (2) the trial court failed to instruct the jury as requested and (3) the trial court erred in its various rulings on the admissibility of evidence.

Upon review of the trial transcript, we find that the trial court's comments to the jury to be

wholly appropriate. Further, as to appellants' objections to the trial court's rulings on the admissibility of evidence, appellants fail to address any specific claimed error. Pursuant to App. R. 12(A), this court need not address any claimed error not argued in the brief. However, in the interest of justice, this court has reviewed the entire transcript and finds no prejudicial error as claimed by appellants. Finally, as to appellants' contention that the trial court erred in failing to instruct the jury as requested we find that the trial court did not commit prejudicial error in refusing such instructions. Accordingly, appellants' fifth assignment of error is found not well-taken.

In their sixth assignment of error, appellants content that the trial court erred in not granting appellants' motion for new trial filed on June 30, 1988, and overruled on July 13, 1988.

In Verbon v. Pennese (1982), 7 Ohio App. 3d 182, 184, this court stated as follows:

> "The granting of a motion for new trial rests largely in the sound discretion of the trial court, and

the granting or refusal of such motion will not be disturbed upon review unless there is an abuse of judicial discretion."

A thorough review of the entire record herein reveals no abuse of discretion on the part of the trial court in overruling appellants' motion for new trial. Accordingly, appellants' sixth assignment of error is found not well-taken.

On consideration whereof, the court finds substantial justice has been done the parties complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. It is ordered that appellants pay the court costs of this appeal. All pending motions are hereby rendered moot and found not well-taken.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Appellate Procedure. See also Suup. R. 4, amended 1/1/80.

Peter M. Handwork, P.J.

PRESIDING JUDGE

George M. Glasser, J.

JUDGE

Charles D. Abood, J.
CONCUR.

JUDGE

[1]On September 21, 1983, appellee, pursuant to Toledo Municipal Code Section 1353.02, served appellant, Merrill Dutridge, with written notice declaring the premises at 2943 Escott, Toledo, Ohio, to be a public nuisance and ordering appellants to clean up the premises within twenty-four hours. On October 7, 1983, appellee commenced abatement procedures at 2943 Escott. On October 11, 1983, appellant, Merrill Dutridge, filed a motion for injunctive relief requesting the court to enjoin appellee from abating the nuisance conditions existing in the yard at 2943 Escott. A hearing was held on October 21, 1983, before Judge Joseph B. Grisby. In a judgment entry filed November 10, 1983, the court ordered appellant, Merrill Dutridge, to clean up the yard by November 10, 1983. The court further ordered appellee to clean up the yard if appellant failed to do so by November 10, 1983. On November 14, 15, and 16, appellee proceeded to clean up the yard pursuant to the court's November 10, 1983 order.

[2]See fn. 1.

IN THE COURT OF APPEALS OF LUCAS COUNTY

FILED: June 21, 1990

City of Toledo Division of Building Inspection	Court of Appeals No. L-88-257 (L-88-256) (L-88-255)
Appellee	
	Trial Court No. CV 86-1554
v.	
	DECISION AND JOURNAL ENTRY
Merrill and Lloyd Dutridge	
	Decided: June 21, 1990
Appellants	

This matter is before the court on defendants-appellants' motion for reconsideration of this court's decision of May 18, 1990.

As stated in Matthews v. Matthews (1981), 5 Ohio App. 3d 140, at paragraph two of the syllabus:

> "The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been."

Upon full consideration of appellants' motion for reconsideration, this court finds that appellants have failed to call to our attention

any "obvious error" in our decision, or raise any issues that have not been thoroughly considered by this court in the original appeal. Accordingly, we find appellants' motion for reconsideration not well-taken and the same is hereby denied.

Peter M. Handwork, P.J. _____ Presiding Judge

George M. Glasser, J. _____ Judge

Charles D. Abood, J. _____ Judge
CONCUR.

APPENDIX A

IN THE COURT OF COMMON PLEAS
OF LUCAS COUNTY, OHIO

City of Toledo, Division of Building Inspection,	)	FILED: May 18, 1988
Plaintiffs,	)	Case No. 84-1312
v.	)	OPINION AND JUDGMENT ENTRY
Merrill E. Dutridge, and Lloyd W. Dutridge,	)	
Defendants.	)	

* * * * *

This cause is before the Court of plaintiff City of Toledo's motion for summary judgment filed on October 7, 1986 in Case No. 84-1312, inclusive of the other cases consolidated therewith - Case No. 86-1554 and Case No. 87-0336. In filing the instant motion plaintiff incorporates by reference the arguments set forth in its previously filed motion to dismiss and motion for summary judgment wherein plaintiff requested this Court to dismiss Case No. 86-1554 and Case No. 87-0336, on the grounds that the matters asserted therein were either res judicata, moot and/or collaterally estopped.[1]

Footnote No. 1. At a March 4, 1988 hearing on this matter the City conceded that the pending motion for summary judgment incorporates the law and issues previously raised in their motion to dismiss. The City subsequently filed a motion to supplement its October 7, 1987 summary judgment motion by combining the same with its April 28, 1987 motion to dismiss and for summary judgment. This motion to supplement was granted May 17, 1988.

APP. P. 19

APP. P. 19

In its Opinion and Judgment Entry of August 21, 1987 this Court denied plaintiff's prior motion to dismiss but gave plaintiff leave to file this subsequent motion for summary judgment. This Court also reserved ruling on plaintiff's prior motion for summary judgment as to Case No. 84-1312. On March 4, 1988, a hearing was held on the present motion for summary judgment. Based on the oral testimony elicited at the hearing, the exhibits proffered, the affidavits and the memoranda of counsel this Court finds plaintiff's motion well-taken and therefore granted in part and not well-taken and therefore denied in part, as will be set forth below.

The present action arose as a result of nuisance conditions existing in and at the defendants' premises at 2943 Escott, in Toledo, Ohio in 1983 and 1984. This cause, No. 84-1312, was filed in May of 1984 by plaintiff for injunctive relief and damages concerning the abatement of the nuisance conditions. The city requested abatement of the nuisance by demolition of a garage located on the Dut-

ridges' premises and requested its costs incurred in the present abatement action and those incurred in a prior clean-up of the same premises. The Dutridge's, in their second amended answer and counterclaim filed on September 8, 1987, counterclaimed for compensatory and punitive damages. In Court One of their counterclaim the Dutridges allege that the City damaged property worth $40,000 by a reckless and unreasonable demolition. In Count Two of their second amended counterclaim the Dutridges assert that the City's actions in razing the garage were unconstitutional as they were taken without hearing or reasonable notice.

Consolidated with Case No. 84-1312 is Case No. 87-0336 which was originally filed by the Dutridges on October 9, 1984 as Case No. 84-2599 against the City of Toledo, a Toledo Police Officer and the Toledo Police Department, for alleged incidents occuring on October 7, 1983 at 2943 Escott during an earlier yard clean-up by the City. This case

was dismissed without prejudice in January of 1986 and refiled as Case No. 87-0336. In Count One of this complaint the Dutridges allege violations of their constitutional rights and property damage by the City as a result of its conduct on that date. In Count Two of the complaint the Dutridges allege that Mr. Dutridge was assaulted and battered by a police officer on October 7, 1983.

Also, consolidated with Case No. 84-1312 is Case No. 86-1554, which was initially filed in January of 1986 in Toledo Municipal Court by Donald Green, assignee of the City of Toledo, to collect from the Dutridges the costs of the November 1983 yard clean-up and the September 1984 garage demolition. This action was subsequently transferred to this Court when defendants, the Dutridges, filed counter-claims against the City of Toledo which exceeded the jurisdictional limit of the Municipal Court. In Count One of their counter-claim the Dutridges again request compensatory and punitive damages for damage to their

property worth $40,000, which was destroyed in the garage demolition. In Count Two of their complaint the Dutridges again seek damages for the alleged assault and battery of Mr. Dutridge on October 7, 1983.

The Court will consider the City's motion for summary judgment, as it relates to each of the counts of the complaint and counter-claims set forth above.

I. CASE NO. 84-1312

In both its previous and instant motion for summary judgment plaintiff asserts that pursuant to statute and prior court orders it is entitled to summary judgment on the remainder of Count Three of the complaint that it incurred and shall be reimbursed for costs expended in the abatement of the nuisance conditions at 1943 Escott in the amount of $4,077.01. In support of these assertions the City contends that Rev. Code 715.26 and 715.29; Toledo Municipal Charter §§8(1) 8 (r); and Toledo Municipal Code 1353.01 empower it to declare

the conditions existing at 2943 Escott to be a nuisance and abate the same. Plaintiff asserts further that a judicial determination was made as to the nuisance status at that address and this Court previously authorized it to abate the same and assessed the costs of abatement to the Dutridges. Plaintiff contends, therefore, that all that remains for determination on Count Three of the complaint is the amount of costs expended in abatement and the undisputed evidence indicates that total costs were $4,077.01.

A review of the record regarding Case No. 84-1312 indicates that Count One of the complaint was voluntarily dismissed by the City in May of 1984. In a Judgment Entry filed on June 25, 1984, Judge Restivo declared the garage at 1943 Escott to be a public nuisance and ordered the Dutridges to post bond and repair the garage within thirty days or the City would be authorized to raze it at the Dutridges expense, thus entering judgment on Count Two of the complaint and part of Count Three as it pertains to the right of the City

to recover costs expended in the demolition of the garage. (See Plaintiff's Exhibits Nos. 14 and 15.) On August 17, 1984, Judge Restivo signed a second judgment entry wherein he found that the defendants had not obeyed the order of June 25, 1984, and authorized the City to effectuate the remainder of that order by razing the building at the cost of the Dutridges. (See Plaintiff's Exhibit No. 16) At that time no determination could be made as to the costs of abatement.

This Court has reviewed the pertinent statutory provisions and the previous court orders herein, and finds that plaintiff is entitled to recover the costs incurred in the demolition of the garage. The Court finds further that plaintiff is also entitled to recover its costs incurred in the previous nuisance abatement effectuated by the November 1983 yard clean-up, as was also requested by plaintiff in Count Three of the complaint. Therefore, all that remains to be determined is the total amount of abatement costs plain-

tiff is entitled to. Plaintiff has submitted invoices reflecting the amounts expended in the November, 1983 yard clean-up and the September, 1984 garage demolition, these amounts being $996.22 and $3,080.79 respectively. (See Plaintiff's Exhibits Nos. 10 and 18) Counsel for defendants, at the oral hearing on plaintiff's motion for summary judgment, stated that defendants question by affidavit the man hours claimed by the City, however, no competent evidence has been offered in support of their contentions tending to raise any issues of fact as to the costs incurred by plaintiff. Accordingly, this Court finds that the undisputed evidence demonstrates that the total costs expended by plaintiff in abating the nuisance conditions existing at 2943 Escott on November of 1983 and September of 1984 amount to $4,077.01. However, at this time final judgment for plaintiff in that amount shall not be entered pending determination at trial as to Count One of the Dutridges' counterclaim wherein they allege that $40,000 in pro-

perty damage was incurred in the abatement of the garage, which could result in a potential setoff.

The Court will consider next plaintiff's motion for summary judgment as it relates to Count Two of the Dutridges' counterclaim against the City wherein they allege violation of their constitutional rights of due process in the demolition of their garage. The City maintains that this counterclaim must be dismissed on the basis of res judicata, mootness and/or collateral estoppel by virtue of a ruling rendered by the U.S. District Court for the Northern District of Ohio, Western Division in Case No. 84-7724, filed by the Dutridges against the City raising this same issue. In support of this assertion the City proffers the report and recommendations of the Federal Magistrate and the final order of the District Court dismissing the Dutridges' case. The City asserts that the District Court found that the Dutridges due process rights had not been violated in abatement of the nuisance

conditions on their premises.

In Norwood v. McDonald (1943), 142 Ohio St. 299, 305, the Court discussed the doctrine of res judicata:

> "A comprehensive definition of res judicata is as follows: 'The doctrine of res judicata is that an existing final judgment rendered on the merits, without frand or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction',"
> * * *
> "If, however, the two suits do not involve the same claim, demand, and cause of action, such effect will not be ordinarily given to the prior judgment 30 American Jurisprudence, 914, Section 172. To constitute a bar there must be identity not only of subject matter but also of the cause of action. In other words, a judgment in a former action does not bar a subsequent action where the cause of action prosecuted is not the same, even though the action relates to the same subject matter." (citations omitted).

In determining whether or not the two actions are to be considered as one, the test generally applied is to consider the identity of facts essential to their maintenance and to

ascertain if the same evidence would sustain both causes of action. If such is the case, then the former action is a bar to the subsequent action even though the two actions are different in form. Norwood, supra; Rush v. Maple Heights (1958), 167 Ohio St. 221; The Ohio Fuel Gas Co. v. City of Mt. Vernon (1930), 37 Ohio App. 159.

The principle of res judicata includes the doctrine of collateral estoppel which precludes relitigation in a subsequent action of an issue of fact or law previously litigated and determined by a valid, final judgment when said determination is essential to that judgment. Seibel v. Crown Cork & Seal Co., Inc. (June 18, 1986), Hamilton App. No. C-850758, unreported; Hicks v. DeLaCruz (1977), 52 Ohio St. 2d 71. In order to assert collateral estoppel successfully, a party must plead and prove the following elements:

> 1) The party against whom estoppel is sought was a party or in privity with a party to the prior action;
>
> 2) There was a final judgment on the merits in the previous case after a

full and fair opportunity to litigate the issue;

3) The issue must have been admitted or actually tried and decided and was not necessary to the final judgment; and

4) The issue must have been identical to the issue involved in the prior suit.

Monahan v. Eagle Picher (1984), 21 Ohio App. 3d 179, 180-181; see Park Lane Hosiery Co. v. Shore (1979), 439 U.S. 322, 326; Hicks v. DeLaCruz (1977), 52 Ohio St. 2d 71, 74-75 (6 O.O. 3d 274).

Upon consideration of the evidence proffered by plaintiff this Court finds that the Dutridges are precluded on the basis of collateral estoppel from bringing their counterclaim alleging violation of their rights of due process in the destruction of the garage. Case No. 84-7724 was filed in District Court by the Dutridges against the City of Toledo and other defendants. In their complaint, the Dutridges alleged violations of their due process rights arising out of the demolition of their garage, the same claim as is set forth

in Count Two of their counterclaim herein. (See Plaintiff's Exhibit 20). On September 13, 1985 the Magistrate issued his report and recommendations in Case No. 84-7724 finding that the defendants named by the Dutridges were immune from prosecution and, therefore, entitled to dismissal of the claims against them. The Magistrate also found, however, that the defendants were entitled to dismissal on the merits, finding that no violation of the Dutridges' due process rights occurred prior to the destruction of the garage. Id. In so finding, the Magistrate pointed out that counsel for the Dutridges had entered into a consent agreement which set a deadline for rehabilitation and provided for demolition if the deadline was not met. The Magistrate stated that at that point all the dictates of due process had been satisfied. In the final order of Case No. 84-7724 dated Juen 17, 1985, Judge Potter considered the Dutridges objections to the Magistrate's report finding them to be without merit and adopted the report and

and recommendations as the order of the court and dismissed the Dutridges' complaint. (See Plaintiff's Exhibit 20).

In light of the foregoing, it is clear that the prerequisites for collateral estoppel as set forth in Monahan, supra, have been met and the Dutridges should not therefore be permitted to relitigate the issue of due process as it pertains to the demolition of their garage. This Court finds further that the other constitutional violations alleged by the Dutridges in Count One of their counterclaim herein are[2] barred by the final judgment in Case No. 84-7724 on the grounds of res judicata for they should necessarily have been asserted therein since they are based on the same cause

2. In their counterclaim the Dutridges also allege, briefly, other constututional violations of their property rights. At the hearing on this matter counsel for the Dutridges argued these issues had not been addressed by the District Court in Case No. 84-7724.

of action. Norwood, supra.

Accordingly, this Court finds plaintiff's motion for summary judgment well-taken as it pertains to Count Two of the Dutridges' counterclaim.

II. CASE NO. 87-0336

In its previous motion to dismiss the City argued that this case must be dismissed pursuant to the doctrines of res judicata and collateral estoppel as the claims asserted by the Dutridges herein concerning property damage, assault and battery and constitutional violations arising out of the October 7, 1983 year clean-up should have been brought in a previous case filed in this Court - Case No. 83-2455.

The record shows that on October 7, 1983, the City entered onto the Dutridges' premises to effectuate a yard clean-up. On October 11, 1983, Mrs. Dutridge filed Cause No. 83-2455 against the City in the Court of Common Pleas seeking temporary, preliminary and permanent

injunctive relief to enjoin the City from proceeding further against their property. (See Plaintiff's Exhibit 1). In the complaint Mrs. Dutridge alleged that on October 7, 1983, the City came onto her property without a hearing and removed valuable items and in so doing acted arbitrarily as the property was not a nuisance. She alleged further that she had been and will continue to be irreparably harmed if the City was permitted to enter their property again and further damage it. On October 21, 1983 a hearing was held and on November 10, 1983 a judgment entry was consented to and signed by counsel for both parties wherein the Court stated that the parties had reached an agreement settling this matter with guidelines as set forth by the court. The Agreement provided that the Dutridges would clean-up the yard by a certain date and failure to do so would result in authorized clean-up by the City. (See Plaintiff's Exhibit No. 9).

Subsequently, on October 9, 1984, the

Dutridges filed Case No. 84-2599 against the City, a police officer and the Toledo Police Department alleging assault and battery of Mr. Dutridge, violation of their constitutional rights by actions of the City of Toledo in entering the premises without legal cause or authority, and damage to their property, all arising out of the October 7, 1983 yard clean-up. As set forth above this case was dismissed without prejudice and later refiled as Case No. 87-0336.

The issue presented here on plaintiff's motion for summary judgment is whether the claims asserted in Case No. 87-0336 should have been asserted in Case No. 83-2455 and therefore must be dismissed with prejudice on the grounds of res judicata and/or collateral estoppel.

The law on res judicata has been previously set forth. Generally, a consent judgment will operate as res judicata to the same extent as a judgment on the merits. Horne v. Woolever (1959), 170 Ohio St. 178. Upon a thorough

review of the evidence submitted by the plaintiff, particularly the transcript of proceedings of the hearing held on October 21, 1983 in Case No. 83-2455, and applying the tests set forth in Norwood, supra, for determining if the two actions should be considered as one, this Court finds that the claims asserted herein as to the constitutional violations and property damage and those brought previously in Case No. 83-2455 as involve a single cause of action and therefore the claims brought herein are barred, pursuant to the doctrine of res judicata, by the consent judgment entered in Case No. 83-2455. However, the Court finds that the assault and battery claim involves a separate cause of action and therefore the Dutridges are not precluded from bringing that claim.

In reaching this determination the Court, in evaluating the record under the Norwood standard, has ascertained that the same operative facts and evidence relied on in reaching the consent judgment in Case No. 84-2455

are essential to establishing the constitutional and damage claims alleged herein. Specifically these operative facts include the condition of the Dutridges' premises past and present, the statutory rights of the City concerning nuisance abatement, and the series of events and actions by the City concerning the Dutridges. In other words, the same proof is required to sustain both actions. It is clear to this Court that both actions involve the same claims with regard to the conduct of the City, and the claims accrued at the same time. However, concerning the Dutridges' assault and battery claim, the opposite is true as different rpoof is required to sustain this claim and the Court finds it constitutes a separate cause of action.

Accordingly, plaintiff's motion for summary judgment is granted as to the Dutridges' claims of constitutional violations and property damage and these claims will be dismissed with prejudice. Plaintiff's motion for summary judgment is denied as to the Dutridges'

assault and battery claim.

III. CASE NO. 86-1554

Finally, considering the City's motion for summary judgment as it relates to Case No. 86-1554, the City argues that the claims filed by Mr. Green should be dismissed with prejudice as should the counterclaims filed by the Dutridges herein. As set forth above, plaintiff Donald Green, as assignee of the City filed this action to collect the costs incurred in the yard clean-up and garage demolition at the Dutridges' premises. The Dutridges filed their same counterclaims against the City alleging constitutional violations, and property damage arising from the garage demolition and an assault and battery claim arising from the October 8, 1983 yard clean-up. The City asserts that the claims brought by Mr. Green should be dismissed since they were filed prematurely and the same claim is currently pending in Case No. 84-1312. The City also asserts that the counterclaims filed by the

Dutridges should be dismissed on the grounds of res judicata and/or collateral estoppel, and because the counterclaims are directed at the City of Toledo, yet the Dutridges failed to third-party in the City.

Concerning the claims brought by plaintiff Green, the Court finds that they are indeed duplicative of those filed and already partially determined in Case No. 84-1312 and that these claims will be more properly and fully addressed in that case and therefore plaintiff Green's complaint will be dismissed with prejudice. As for the counterclaims asserted by the Dutridges in 86-1554, Counts One and Two of the counterclaims (concerning damages incurred in the garage demolition and the alleged assault and battery arising from the October 7, 1983 yard clean-up respectively) will be dismissed with prejudice for the same reasons that the complaint herein is to be dismissed. The counterclaims will be more properly and fully addressed in Case No. 84-1312 and Case No. 87-0336 still pending. As for Count Three

of the Dutridges counterclaim, alleging constitutional violations arising from the garage demolition, the Court has already found in Part I of this opinion that relitigation of this issue is precluded on the basis of collateral estoppel and therefore Count Three of the Dutridges' counterclaim will be dismissed with prejudice as well.

Accordingly, the City's motion for summary judgment as it relates to Case No. 86-1554 is granted.

JUDGMENT ENTRY

It is therefore ORDERED, ADJUDGED and DECREED that:

1. In Case No. 84-1312 the City's motion for summary judgment on Count Three of the complaint is found well-taken and hereby granted in that plaintiff incurred $4,077.01 in abatement costs. Plaintiff's motion for summary judgment as to Count Two of the defendants' counterclaim is found well-taken and hereby granted and the same is dismissed with prejudice. Count One of the Dutridges' counterclaim remains for trial

2. In Case No. 87-0336 the City's motion for summary judgment is found well-taken and hereby granted as to the Dutridges' constitutional and property damage claims and the same are dismissed with prejudice. The Dutridges' assault and battery claim

remains for trial.

3. In Case No. 86-1554 the City's motion for summary judgment is found well-taken and hereby granted. The complaint brought by Donald Green is dismissed with prejudice. Each of the counterclaims asserted by the Dutridges are also dismissed with prejudice.

May 18, 1988

William J. Skow (S)
William J. Skow, Judge

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